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In The

Supreme Court of the United States

October Term, 1994

GLORIA B. WILLIAMS,

Petitioner,

v.

DAVID A. GARRAGHTY,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the protection afforded employees by the opposition clause of Title VII for voicing concerns about sexual harassment in the workplace, recognized by the federal circuit courts, be limited by a more restrictive definition of qualified privilege under state defamation law adopted by the highest court of a state?

LIST OF ALL PARTIES

The petitioner, who was defendant in the action below, is Gloria B. Williams. The respondent, who was plaintiff in the action below, is David A. Garraghty.

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Petition For Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

Gloria B. Williams respectfully petitions this Court for a writ of certiorari to review the judgment of the Virginia Supreme Court in this case.

OPINIONS BELOW

The opinion of the Virginia Supreme Court is reproduced in Petitioner's Appendix at pages A-1 to A-21, reported as *Williams v. Garraghty*, 249 Va. 224, 455 S.E.2d 209 (1995). The final order of the trial court (unreported) is reproduced at Petitioner's Appendix at pages A-22 to

A-26. References to the Petitioner's Appendix shall be designated as "(Pet. App. ___)".

JURISDICTION

The Virginia Supreme Court entered judgment on March 3, 1995. There have been no proceedings since that date. This Court has jurisdiction under 28 U.S.C. § 1257(a) because this appeal involves the denial of a privilege derived from federal law.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This petition involves an interpretation of the Supremacy Clause of the United States Constitution, Article VI, clause 2 and the "opposition clause" of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), both of which are reprinted in the appendix hereto.

INTRODUCTION

On March 3, 1995, the Virginia Supreme Court handed down a decision which placed Virginia common law squarely at odds with the protection afforded employees by Title VII to voice concerns about workplace discrimination and harassment. Every federal circuit court that has addressed the issue has stated that the "opposition clause" to Title VII protects an employee's right to express concern about unlawful employment

practices, *regardless* of whether the employee's audience has any duty or interest in the complaint and regardless of whether a formal complaint was filed with the EEOC. The Virginia Supreme Court, however, rejected that protection for actions brought under state defamation law, and declared that an employee who chooses to follow state-sanctioned policies and procedures by making a well-founded, informal complaint of harassment to her employers enjoys no qualified privilege under state defamation law when she seeks advice from co-workers. Thus, the Court upheld a $177,597 verdict against the victim and in favor of the harasser who had been appropriately disciplined, while at the same time the Court recognized that the verdict could not have stood had it been brought in the federal venue under Title VII.

STATEMENT OF THE CASE

1. Proceedings Below

Respondent David A. Garraghty ("Garraghty") filed suit against Petitioner Gloria B. Williams ("Williams") in the Circuit Court of Nottoway County (Virginia) on November 5, 1992, alleging (in pertinent part) that Williams had defamed him by accusing him of sexual harassment. The alleged harassment occurred while Williams was working under Garraghty's supervision at the Nottoway Correctional Center, a prison for adult male offenders operated by the Virginia Department of Corrections ("the Department").

Throughout the course of defending this defamation claim, Williams has asserted a qualified privilege for

making her allegation of sexual harassment, based upon the "opposition clause" of Title VII,[1] which protects employees against retaliation for asserting their rights under Title VII. Both the state trial court and the Virginia Supreme Court rejected Williams' proffered jury instructions incorporating that privilege. A jury returned a verdict for defamation for Garraghty against Williams for a total of $277,597, which was reduced by the trial court to $177,597.[2] That verdict was sustained by the Virginia Supreme Court, which ruled, in part, that there was no error in rejecting Williams' proffered jury instructions, which incorporated the qualified privilege asserted under Title VII.

2. Background

Garraghty's defamation suit against Williams was based upon a memorandum ("the Memo") (Pet. App. A-30 to A-31) written by Williams to Garraghty in which Williams alleged that she perceived that Garraghty was sexually harassing her by taking a variety of adverse personnel actions against her in retaliation for Williams' rejection of Garraghty's sexual advances. At all times pertinent to this litigation, Garraghty was warden of the

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[1] Title 42 U.S.C. § 2000e-3(a) provides a remedy for any employee who suffers adverse employment action for opposing any practice made illegal by Title VII.

[2] The jury award consisted of $152,597 in compensatory damages and $125,000 in punitive damages. The trial court ordered a remittitur of the punitive award from $125,000 to $25,000.

Nottoway Correctional Center and Williams was his subordinate, employed as Human Resource Officer for the prison.

Williams prepared the Memo and placed it on Garraghty's desk only after consulting with the Manager of Employee Relations for the Department, Paul Broughton. It was Broughton's advice to Williams that prompted her to put her concerns in writing to Garraghty, asking for a private meeting after Garraghty had read the Memo. Additionally, Williams had sought advice from several other co-employees about her perception of being harassed by Garraghty. There was no evidence at trial that Williams had spoken to anyone other than fellow employees and Broughton about her claim against Garraghty.

Moreover, it was undisputed at trial that Williams' intent was to talk with Garraghty privately to seek an informal resolution of her complaint. It was Garraghty who converted Williams' informal complaint into a formal complaint by self-reporting the allegations to his supervisor. The Department conducted an investigation of Williams' allegations and found that Garraghty had harassed Williams, as alleged. The Director of the Department, Ed Murray, terminated Garraghty's employment based upon this investigation.

Garraghty appealed his termination to the Secretary of Public Safety, O. Randolph Rollins. Rollins determined that the record contained credible evidence that Garraghty had harassed Williams by retaliating against her for rejecting his sexual advances. Nevertheless, Rollins concluded that termination was too harsh. Instead, he

ordered that Garraghty be suspended for thirty days and demoted to a lower paying position with the Department. Garraghty thereafter sued Williams for defamation relating solely to her complaint of sexual harassment.

At the close of the state trial (before a jury), the parties submitted jury instructions. While the parties agreed that the circumstances under which Williams made her statement concerning her perception of harassment warranted giving a qualified privilege instruction, the parties differed in the wording of the instruction defining the circumstances by which the privilege could be lost. It is this legal dispute which provides the basis for this petition.

Garraghty's instruction (Pet. App. A-27) was the standard Virginia instruction for qualified privilege in defamation actions, permitting the jury to find the privilege lost upon a finding of any one of five conditions: (1) if the defendant knew the statement was false or made it with reckless disregard of whether it was false or not; (2) the statement was deliberately made in such a way that it was heard by persons having no interest or duty in the subject or the statement; (3) the statement was unnecessarily insulting; (4) the language used was too strong or more violent than was necessary under the circumstances; or (5) the statement was made because of hatred, ill will or a desire to hurt the plaintiff rather than as a fair comment on the subject.

Williams objected to conditions (2), (3) and (4) of this instruction, arguing that each of these conditions was inconsistent with the federal privilege under Title VII for an employee to freely voice objections to conduct prohibited by Title VII without fear of reprisal. Both the trial

court and the Virginia Supreme Court rejected that argument and rejected Williams' proffered instruction which captured that privilege by providing that only statements made maliciously or in bad faith could defeat the federal privilege (Pet. App. A-28).

REASONS FOR GRANTING THE WRIT

I. The Virginia Supreme Court's Ruling Reflects A Fundamental Misunderstanding Of The Protection Afforded Employees By The Opposition Clause Of Title VII

To Williams' argument that the trial court erred in rejecting her jury instruction incorporating her privilege to voice her complaint about perceived sexual harassment, the Virginia Supreme Court stated simply that

> [t]he present case is not a proceeding brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. This proceeding is a state action for defamation, and Instruction No. 12 was a correct statement of the law.

(Pet. App. A-12). In so holding, the Court ignored the federal privilege afforded by the opposition clause, thereby frustrating Congressional intent to encourage employees to protest illegal employment practices.

What the Court missed is the significance of the distinction between the privileges afforded by the "participation" and "opposition" clauses of Title VII. The two are separate and distinct provisions under 42 U.S.C. § 2000e-3(a) which prohibit an employer from retaliating against an employee for that employee's assertions of

rights under Title VII. The participation clause prohibits retaliation against any employee who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." The opposition clause prohibits retaliation against an employee for opposing "any practice made unlawful by [Title VII]."

"[T]he 'participation clause' covers a narrower range of activities than the other, [but] gives those activities stronger protection than the 'opposition' clause provides." *Croushorn v. Bd. of Trustees of Univ. of Tenn.*, 518 F. Supp. 9, 21 (M.D.Tenn. 1980), following *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).[3] The Virginia courts erroneously reviewed Williams' proffered instruction under the narrow circumstances – i.e., the actual filing of a formal Title VII complaint with the EEOC – which would have invoked the near-absolute protection of the participation clause.[4] The distinction

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[3] As the Courts in both *Croushorn* and *Sias* note, there is even a split among the district and circuit courts as to the level of protection afforded by the opposition clause. Some courts require that the employer actually be guilty of the employment discrimination opposed for the employee to be protected, while other courts require only that the employee have a reasonable belief that the employer's conduct was unlawful. *Compare* cases cited in discussion in *Croushorn*, 518 F. Supp. at 25 and *Sias*, 588 F.2d at 695. This case affords this Court an opportunity to resolve this conflict within the federal courts at the same time it addresses the conflict between federal circuit and Virginia court law.

[4] Because Williams chose not to file a formal complaint with the EEOC, she claims the source of the federal privilege to be the opposition clause rather than the participation clause.

ignored or missed by the Virginia court is that opposition clause protection is not limited to actual proceedings brought under Title VII. The protection afforded by the clause extends to any expression of an employee's belief that her employer is engaged in an unlawful employment practice (such as sexual harassment) – a qualified privilege which may be lost only if that belief is unreasonable. *Sias*, 588 F.2d at 695 ("[w]hen an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts") (quoting *Hearth v. Metropolitan Transit Commission*, 436 F. Supp. 685, 688-89 (D.Minn. 1977)).[5]

Judicial recognition that the opposition clause protects complaints of discrimination made to third parties was confirmed in *Equal Employment Opportunity Commission v. Crown Zellerbach Corporation*, 720 F.2d 1008 (9th Cir. 1983), where the Court held that allegations by black employees to a customer of their employer about their employer's allegedly discriminatory practices were statutorily protected expressions under the opposition clause. Because that activity was not disruptive, the Court held that the employer could not discipline the employees, regardless of the merits of the allegations.

The sole source of the defamation action against Williams was her informal complaint (made formal by Garraghty's self-reporting) alleging that she was the victim

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[5] The Ninth Circuit in *Sias* also concluded that "[a] similar interpretation is suggested by implication but without discussion in [this Court's decision in] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973)." *Sias*, 588 F.2d at 695 n.3.

of sexual harassment – conduct prohibited by Title VII. Because her complaint was protected by the opposition clause, she was entitled to the protection of the federal privilege.[6] That the appeal involved an action for defamation is irrelevant to Williams' entitlement to the protection of the opposition clause. Such a restrictive reading of the opposition clause will necessarily have a chilling effect upon employees' willingness to complain about perceived sexual harassment from other employees.

II. The Opinion Of The Virginia Supreme Court Is In Irreconcilable Conflict With Interpretations Of The Opposition Clause By The Federal Judiciary

In support of her proffered instruction #2, Williams cited two opinions of federal district courts, *Coleman v. Wayne State University*, 664 F. Supp. 1082 (E.D. Mich. 1987), and *Equal Employment Opportunity Commission v. Virginia Carolina Veneer Corporation*, 495 F. Supp. 775 (W.D. Va. 1980), both of which recognize an employee's privilege under Title VII to oppose discriminatory practices

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[6] The fact that the jury imposed a punitive award against Williams, indicative of actual malice, does not cure the defective jury instruction. The given instruction permits a jury to infer malice from the manner or frequency of publication. Neither the trial court nor the Virginia Supreme Court recited any specific evidence of actual malice in the record to support the punitive award, but it is likely that the jury inferred malice from Williams' statements to co-workers who had no duty to investigate or cure the harassment. Had the jury been properly instructed as to the scope of the privilege, they would have known that Williams had a right to express her concerns, and since "excessive publication" would not defeat the privilege it certainly could not be the basis for a finding of malice.

within the prohibitions of Title VII. In *Coleman*, the court ruled that "repeated public and private expressions" representing a reasonable belief that an employer had violated Title VII were protected under the opposition clause. 664 F. Supp. at 1092. In *Carolina Veneer*, the court ruled that a defamation action by an employer against an employee for making a complaint about sexual harassment was barred by the strong federal policy to "protect an employee who utilizes the procedures provided by Congress for the vindication of his right to be free from unlawful discrimination in employment." 495 F. Supp. at 778.[7]

The opinion of the Virginia Supreme Court not only ignores this privilege, but it stands in irreconcilable conflict with precedents of the federal circuit courts. For example, the Fifth Circuit Court of Appeals in *Garziano v. E.I. DuPont De Nemours and Co.*, 818 F.2d 380 (5th Cir. 1987), the Court reversed a jury award against an employer in favor of an employee accused of sexual harassment, in part, because of defective jury instructions which permitted the jury to find for the plaintiff because the employer had notified all employees of the termination of plaintiff for sexual harassment. The reversal was premised largely upon the recognition that an employer's

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[7] Williams does not claim that her conversations were absolutely privileged as in *Carolina Veneer*, which involved a defamation suit for the actual filing of a complaint of sexual harassment with the EEOC, an activity protected by the participation clause of 42 U.S.C. § 2000e-3(a). Williams does assert that the opposition clause entitles her to raise her complaints to other co-employees - as in *Coleman* - without losing the qualified privilege under Title VII.

obligations under Title VII to eliminate sexual harassment and to educate its employees of their rights to raise complaints of sexual harassment requires that such communications be immunized against defamation claims.

Like the employer in *Garziano*, Williams' communications concerning her complaint did not go beyond other employees. Yet the Virginia Supreme Court approved Garraghty's instruction by which the privilege was lost if her complaint "was heard by persons having no interest or duty in the subject of the statement" or was "unnecessarily insulting", or if the language used was "stronger or more violent" than necessary. Consistent with Title VII and judicial interpretations, Williams has a statutory right to oppose what she reasonably perceived to be sexual harassment from a supervisor and to voice her concerns privately or publicly. Accordingly, it was error for the state courts to permit the jury to assume the privilege was lost by Williams' conversations with other employees. The other two circumstances under which the privilege can be lost and to which Williams objected are too subjective and ill-defined to be used as a means of defeating the immunity provided by the opposition clause.

Williams' complaint about sexual harassment was neither disruptive nor contrary to the employer's interest. *See Equal Employment Opportunity Commission v. Crown Zellerbach Corporation*, 720 F.2d 1008 (regardless of the merits of the allegations, black employees' non-disruptive statements to a customer of their employer about their employer's allegedly discriminatory practices were statutorily protected expressions under the opposition clause). To the contrary, Williams followed her

employer's advice by approaching Garraghty informally. Her conversation with other co-employees similarly occurred in the context of seeking advice. As a matter of law and public policy, Williams should not be punished because she declined to escalate her complaint to a formal EEOC filing in favor of following the more informal procedure provided by her employer.

There should be no question that Williams' conversation with other employees about her perception of Garraghty's sexual harassment was protected by the opposition clause. To permit that protection to be lost by denying Williams a qualified privilege under state law when sued for defamation simply because she raised her concerns to other employees or because of her choice of words cannot be reconciled with precedent or with the strong public policy underlying the opposition clause of Title VII.

If the Virginia Supreme Court's approval of the challenged jury instruction remains good law in Virginia, the citizens of Virginia will be denied the protection of Title VII enjoyed by the citizens of other states. The inevitable chilling effect upon victims of sexual harassment (and their witnesses) in the workplace cannot be tolerated. The result would be anomalous, as in this case: an employee who makes a complaint about sexual harassment determined by the employer to be founded is nevertheless subject to a devastating civil judgment for defamation brought by the accused. Williams has been, in effect, punished for exercising her federal rights.

The potential for injustice under this state of the law was graphically realized in this case. Williams was

encouraged to pursue her complaint by her employer's policy; she followed the advice and direction of her employer; she participated in the employer's investigation; and her employer found her complaint to have merit, disciplining Garraghty for harassment. Garraghty thereafter obtained a large jury award against Williams for defamation, made possible by a state sanctioned jury instruction which ignores Williams' qualified privilege under federal law designed to encourage her to vindicate her rights under Title VII. The practical effect of the *Garraghty* decision is that a jury can award damages against an employee merely by finding that (1) the employee discussed with another employee his or her perception of sexual harassment from a supervisor and (2) the perception was incorrect (in the jury's judgment), even though, as here, the employer finds merit to the complaint. No employee should have to pay such a price for vindication and only this Court can reverse the injustice suffered by Williams and prevent a recurrence for other employees who perceive harassment from supervisors.

III. The Opinion of the Virginia Supreme Court Violates the Supremacy Clause

Throughout the course of this litigation, Williams has repeatedly urged the state courts to recognize her rights under the opposition clause of Title VII by modifying the Virginia jury instruction on qualified privilege. The rejection of her position by both the trial court and the Virginia Supreme Court violates the Supremacy Clause of Article VI of the Constitution.

In *English v. General Electric Company*, 496 U.S. 72 (1990), this Court recognized that state law is preempted in three circumstances, one of which is where state law actually conflicts with federal law. Under the circumstances of this case, there is a clear conflict between the federal protection afforded employees to oppose prohibited discrimination in the workplace and under Title VII and the limitation of Virginia law of qualified privilege for employees who complain of their supervisors' conduct.

Because the narrow privilege provided by state law has the effect of defeating the broad protection afforded by the opposition clause, the former must yield to the latter. The jury instruction offered by Garraghty and approved by the state courts in this case clearly creates "an obstacle to the accomplishment and execution of the full objectives of Congress," *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986), reflected by the opposition clause of Title VII.

To be effective, Title VII must be interpreted consistently nationwide and any state jury instructions which prevent such uniformity must be rejected. Only this Court has the authority to do so in this case.

CONCLUSION

The present case presents an important issue, the resolution of which is necessary to preserve the protection of Title VII to employees asserting their rights to a work environment free of sexual harassment. The failure

of the Virginia Supreme Court to recognize that the protection of the opposition clause extends beyond "Title VII cases" exposes employees to punitive jury awards which can only deter the exercise of their Title VII rights. By granting this petition for review, the Court would have its first opportunity to interpret the opposition clause of Title VII in the context of a challenge to state laws which limit or defeat its scope.

This case presents significant issues of interpretations of federal law and the Supremacy Clause. The importance of the issues raised coupled with the conflict between the Virginia Supreme Court's opinion with precedent from the federal circuits–warrants a review by this Court.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Present: All the Justices

GLORIA B. WILLIAMS

v. Record No. 940727

DAVID A. GARRAGHTY

OPINION BY JUSTICE ROSCOE B. STEPHENSON, JR.
March 3, 1995

DAVID A. GARRAGHTY

v. Record No. 940729

GLORIA B. WILLIAMS

FROM THE CIRCUIT COURT OF NOTTOWAY COUNTY
James F. D'Alton, Jr., Judge

These consolidated appeals from a single judgment present various issues arising out of a plaintiff's recovery of damages in a defamation action.

I

David A. Garraghty, a prison warden employed by the Virginia Department of Corrections (the Department), sued Gloria B. Williams, a subordinate employee, seeking damages for defamation, insulting words, and intentional and negligent infliction of emotional distress resulting from a memorandum written by Williams. In the memorandum, Williams accused Garraghty of sexual harassment.

Williams filed a demurrer to Garraghty's motion for judgment, contending, *inter alia*, that the statements in

the memorandum were constitutionally protected expressions of opinion. In ruling on the demurrer, the trial court rejected Williams' contention that the statements were expressions of opinion and concluded that Garraghty could proceed with his common law defamation claim and his statutory insulting words claim. The court also ruled that Garraghty's damage claim would be limited to "non-personal" damages, *i.e.*, damage to community reputation, lost wages, and financial detriment resulting from injury to occupation. With respect to Garraghty's damage claim for pain and suffering, humiliation and embarrassment, and mental distress, the court ruled that such damages were not recoverable because they were within the exclusive jurisdiction of the Workers' Compensation Act. The court also ruled that Garraghty's claims of intentional and negligent infliction of emotional distress were exclusively within the jurisdiction of the Workers' Compensation Act.

Prior to trial, Williams moved for summary judgment, claiming that her statements in the memorandum were absolutely privileged because the statements were made (a) in the context of her exercise of a federally protected right, or, alternatively, (b) in the course of a judicial proceeding. Williams also reasserted the claim that her statements were constitutionally protected expressions of opinion, incapable of being proved objectively as true or false. The trial court overruled the summary judgment motion.

The case proceeded to trial before a jury on Garraghty's common law defamation and statutory insulting words claims. Following a three-day trial, the jury returned a verdict in Garraghty's favor, awarding him

compensatory damages in the amount of $152,597 and punitive damages in the amount of $125,000.

Williams thereafter moved the court to set aside the verdict. Williams argued that Garraghty did not prove that the statements in the memorandum were false or, if false, that she was negligent in making the statements. Williams also claimed that the punitive damages award should be set aside because the record did not disclose clear and convincing evidence that she had acted with actual malice.

The trial court found that the compensatory damages award was supported by the evidence, but that the punitive damages award was excessive. The trial court then required Garraghty to elect whether to accept a new trial or a remittitur of a portion of the punitive damages award. Upon Garraghty's election, under protest, the trial court overruled the motion to set aside the verdict and ordered Garraghty to remit $100,000 of the punitive damages award. The trial court entered judgment on the verdict as modified, and each party appeals therefrom.

II

The memorandum that is the basis for Garraghty's action was written by Williams on stationery with a Commonwealth of Virginia, Department of Corrections letterhead. At the time, Garraghty was the warden and Williams was the personnel supervisor (also known as

the "Human Resource Officer") at the Nottoway Correctional Center. Garraghty discovered the memorandum in an envelope on his office desk.[1]

Upon discovering Williams' memorandum, Garraghty called Kern Gillian, the business manager of Nottoway Correctional Center, to his office. Garraghty also called Williams to his office. Garraghty was angry and showed the memorandum to Gillian. When Williams arrived, Garraghty told Williams that he would not allow her to "blackmail this position."

Garraghty then reported the memorandum to the regional administrator, in accordance with Department policy, and requested a full investigation. An investigation was conducted and a report thereof was filed with the director of the Department. Based upon the investigation, the director terminated Garraghty. Subsequently, Garraghty was rehired by the Department at a lower paying position.

An economist testified that Garraghty would suffer $152,597 in lost income over the course of his career as a result of his demotion. This is the precise amount of the compensatory damages that were awarded to Garraghty.

The memorandum alleging sexual harassment by Garraghty reads as follows:

---

[1] Williams concedes that there was sufficient publication of the contents of the memorandum.

TO: DAVID A. GARRAGHTY, WARDEN

FROM: GLORIA B. WILLIAMS /s/GBW
HUMAN RESOURCE OFFICER

SUBJECT: HARASSMENT

I am requesting a meeting with you to discuss what I perceive to be Sexual Harassment once again. Since 3/17/92, when I brought your paycheck to your house and you made the following remarks:

1. You – "Do you want to mess around?"
   Me – No

2. You – "I guess your husband would kill you if you did."
   Me – Yes

You did discontinue that line of conversation at that point and we finished discussing work and I left your house.

Since that time, once again, I have started getting derogatory notes reference my work and performance from you. You have as yet to speak to me personally reference any problems (just notes).

David, from 1986-1988 you and I had a similar problem after I advised you that I was pregnant and getting married. You and I had been seeing each other from 1982 to April 1986. You asked me at that time, why I had not told you about Chuck. Since we had not been seeing each other outside work since April of 86, I did not understand why you felt I needed to discuss Chuck with you. Soon after that, I started getting derogatory notes, and you took my performance from 50 to 28 over the two year period. You had

> me so stressed out because of your attitude toward me that you caused me to have an angina attack and spend 5 days in the hospital (3 days of this in ICU) and eventually to resign in July of 1989.
>
> It took my going to the hospital for you to stop attacking my work performance and stop sending me derogatory notes, and evaluate me fairly on my performance.
>
> Previously when this all happened, I felt threatened and knew if I made a formal complaint, that I would have to resign. I was not in a position at that point in time financially to do this. However, after the trip to the hospital and near heart attack, at the recommendation of my doctor, I started making plans to resign and relocate.
>
> David, I don't want to have to make a formal complaint now. I'd like to think we can work this out, but I can't deal emotionally with another sparring match with you.
>
> Please advise me of a time that will be convenient to meet [to] discuss this situation.

The evidence regarding the alleged sexual harassment by Garraghty is in sharp conflict. Pursuant to established principles of law, however, we must view the evidence in the light most favorable to Garraghty, the prevailing party at trial.

The first instance of harassment referenced in the memorandum allegedly occurred during an encounter between the parties at Garraghty's home on March 17, 1992. Garraghty was ill, and Williams claims she took Garraghty's pay check to his house in response to his

request that "someone" deliver the check. Garraghty testified that he had asked David Robinson, the assistant warden, to deliver the check, but Williams insisted on doing so. When Williams arrived, Garraghty was lying on a sofa. Rather than sitting in a chair, Williams sat on Garraghty. Garraghty emphatically denied that he asked Williams if she wanted to "mess around" or that he said, "I guess your husband would kill you if you did." He did not proposition Williams, and he did not pat her on the knee, as she later claimed.

In the memorandum, Williams next referenced Garraghty's course of conduct after the March 17, 1992 encounter. Garraghty allegedly had written "derogatory notes" regarding Williams' "work and performance" on three interoffice communications.

One communication, titled "Leave Activity Reporting Form," had been filed by Williams on March 20, 1992, to report eight hours of "Other Leave" (OT) that she had taken. On this document, Garraghty had written, "No, I have told you too many times about 8 hrs. of OT and the arbitrary accumulation of OT."

Another communication was an "Interoffice Memorandum" from Brenda Smithson to Williams, dated April 14, 1992, requesting verification that seven named individuals were no longer employees of Nottoway Correctional Center. On this document, Garraghty had written the following note to Williams: "This information should have been sent much earlier than this as per policy."

The third communication was a memorandum from Garraghty to Williams, dated April 21, 1992, which reads as follows:

> You have been spending a great deal of time in Richmond lately. Some of these trips are not worth the effort and can be consolidated or canceled.
>
> You were not here on payday due to a meeting. Today you were taking a file down on A. Jones and discussing a check. This could be done by Federal Express, telephone, or runner.
>
> I would suggest you use your time to develop IOPs, long outstanding, for Personnel.
>
> Please advise if you are having problems with control in using your time.

Garraghty denied that any of these notes to Williams were written in retaliation for Williams' alleged refusal of sexual advances by Garraghty. He testified that the notes were prompted by Williams' failure to conform to Department policies.

The last instance of alleged sexual harassment by Garraghty mentioned in the memorandum regards Garraghty's course of conduct from 1986 to 1988. Garraghty allegedly had sent Williams "derogatory notes" and had lowered her performance rating after she had informed Garraghty that she was pregnant and intended to marry a man named "Chuck."

Garraghty denied that he had sent Williams "derogatory notes" during that time period as a result of her conversation with him about her pregnancy and proposed marriage. He conceded, however, that from time to

time he sent her "performance problem notes and instructions." Garraghty also denied that he had reduced Williams' performance rating, explaining that, due to a directive from the Governor of Virginia, performance evaluations had been suspended during that period of time.

At trial, evidence was presented showing that Williams had taken excessive leave from work, sometimes without permission. The record also showed that Williams' work performance was poor.

III

Williams' appeal (Record No. 940727) contains five assignments of error. We will consider them seriatim.

A

First, Williams claims that the trial court erred in rejecting her argument that her speech contained in the memorandum was constitutionally protected because it was merely an expression of opinion, not of fact. Williams argues that "[b]y its very nature, sexual harassment is in the eye of the beholder." She points to the first sentence in the memorandum where she stated that she "perceives" Garraghty's conduct to be sexual harassment and asserts that "[h]er 'perception' of an inherently subjective concept (harassment) is not capable of being 'proven' as true or false."

It is firmly established that pure expressions of opinion are protected by both the First Amendment to the

Federal Constitution and Article I, Section 12 of the Constitution of Virginia and, therefore, cannot form the basis of a defamation action. *Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 101-02 (1985). Factual statements made to support or justify an opinion, however, can form the basis of an action for defamation. *See Swengler v. ITT Corp.*, 993 F.2d 1063, 1071 (4th Cir. 1993) (construing Virginia law). It is for a court, not a jury, to determine, as a matter of law, whether an alleged defamatory statement is one of fact or of opinion. *Chaves*, 230 Va. at 119, 335 S.E.2d at 102.

While Williams' statement regarding her perception may be properly characterized as mere opinion, the statements supporting her opinion are factual in nature. For example, Williams' statements regarding the March 17, 1992 incident at Garraghty's home and the alleged "derogatory notes" sent by Garraghty in retaliation clearly are factual. So, too, are Williams' statements that Garraghty had retaliated against her during 1986-88 by sending other "derogatory notes" and by reducing her performance evaluation. Therefore, the memorandum contains factual statements that can form the basis of a defamation action.

Thus, we hold that the trial court did not err in rejecting Williams' argument that her speech was constitutionally protected opinion.

B

Next, Williams contends that the trial court abused its discretion when it allowed Garraghty to present evidence about Williams' job performance. Williams asserts

that this evidence was "collateral to the central issues in the case" and "pure speculation." We do not agree.

Generally, evidence that has rational probative value and adds force and effect to other evidence is competent and admissible. A trial court, in the exercise of its discretion, determines whether evidence is competent. *Peacock Buick v. Durkin*, 221 Va. 1133, 1136, 277 S.E.2d 225, 227 (1981). Of course, the weight to be given to such evidence is a decision for a jury. *Litchford v. Hancock*, 232 Va. 496, 499, 352 S.E.2d 335, 337 (1987).

According to Williams' theory of the case, Garraghty's criticism of her work performance was contrived and retaliatory. Garraghty contended, on the other hand, that Williams' job performance was substandard and that she abused her leave time and workers' compensation time.

We think that evidence tending to support Garraghty's theory had rational probative value and added force and effect to other evidence. Therefore, the trial court did not abuse its discretion in determining that such evidence was competent and admissible, and it was the jury's function to decide from this and other evidence which theory should prevail.

C

In a third assignment of error, Williams contends that "[t]he trial court erred in granting [Garraghty's] instruction on qualified privilege and rejecting [Williams'] proffered instruction, thereby denying her the qualified privilege to assert a right recognized by federal law to be

free from sexual harassment."[2] Instruction No. 12 told the jury that, "[u]nder the circumstances of this case, [Williams'] statement was privileged because she [had] an interest or duty in the subject, and she made the statement to another person with a similar interest or duty." Instruction No. 12 also told the jury that Williams' statement would not be protected if she abused the privilege and further set forth what constituted an abuse of privilege. Williams' proffered instruction would have told the jury that her statement was privileged "because she [had] a right under federal law to be free from sexual harassment and from acts of retaliation for asserting a claim of sexual harassment, and to protect this right by seeking redress from any violation of it." Williams' proffered instruction also added an element of good faith perception regarding what constituted an abuse of privilege.

We reject Williams' contention. The present case is not a proceeding brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* This proceeding is a state action for defamation, and Instruction No. 12 was a correct statement of the law. *See, e.g., Smalls v. Wright*, 241 Va. 52, 55-56, 399 S.E.2d 805, 807-08 (1991). Moreover, even if the present case were a Title VII proceeding, Williams would not have been immunized from a state defamation action. *See Bartulica v. Paculdo*, 411 F.Supp. 392, 397 (W.D. Mo., 1976).

---

[2] On appeal, Williams makes a similar argument based upon the Virginia Human Rights Act, Code § 2.1-714 *et seq.* This contention was neither presented to the trial court nor assigned as error to this Court. Therefore, we will not consider the argument. Rule 5:25; Rule 5:17(2)(B).

D

In her fourth assignment of error, Williams claims that "[t]he trial court erred in refusing to set aside the jury verdict for compensatory damages." More specifically, she asserts that Garraghty, as a matter of law, did not prove that the contents of the memorandum were false or that Williams was negligent in failing to discover the falsity of the statements.

The trial court properly instructed the jury that Garraghty must prove that the statements that formed the basis of the defamation action were false. The court further instructed the jury that Garraghty also must prove that Williams knew the statements were false or that, believing them to be true, Williams either lacked reasonable grounds for such belief or acted negligently in failing to ascertain the facts upon which the statements were based. *See Ingles v. Dively*, 246 Va. 244, 251, 435 S.E.2d 641, 645 (1993).

By its verdict, the jury resolved these issues in Garraghty's favor. Thus, we must determine whether there is evidence to support the jury's decision.

Our standard of review is well settled. When sufficiency of the evidence is an issue on appeal, an appellate court must view the evidence in the light most favorable to the prevailing party at trial. Additionally, a trial court's judgment will not be set aside unless it is plainly wrong or without evidence to support it. Code § 8.01-680.

Garraghty presented evidence that Williams' statements were false. He denied that he had made sexual advances toward Williams on March 17, 1992, or that his

notes were written in retaliation of Williams' refusal of any such sexual advances. He also denied that he had sent derogatory and retaliatory notes during the 1986-88 period. He also presented evidence that Williams' job performance had been poor and that she had abused leave privileges.

From the evidence and reasonable inferences deducible therefrom, the jury reasonably could have found that the so-called "derogatory notes" were legitimate criticisms. The jury also could have found that, assuming Williams believed her statements were true, she lacked reasonable grounds for such belief. Clearly, these issues were for the jury, and the evidence supports its findings.

E

1

In her final assignment of error, Williams contends that the trial court erred in failing to set aside the award of punitive damages. She argues that "the record does not support that Williams' [memorandum] was false and therefore cannot establish that she was negligent in drafting it." Therefore, she asserts, she cannot be charged with having made her allegations with actual malice.

The trial court instructed the jury that it could award Garraghty punitive damages, in addition to compensatory damages, if it believed "by clear and convincing evidence that [Williams] made the statements with actual malice; that is, she knew they were false or she made them so recklessly as to amount to a willful disregard for the truth." This was a correct statement of the law. *See,*

e.g., The Gazette v. Harris, 229 Va. 1, 8, 325 S.E.2d 713, 721, *cert. denied*, 472 U.S. 1032, *cert. denied*, 473 U.S. 905 (1985). The jury awarded Garraghty punitive damages in the amount of $125,000.

In returning a verdict in Garraghty's favor, the jury found, based upon the court's instructions regarding privilege, that Williams lost her qualified privilege. The jury had been instructed that Williams' statements were qualifiedly privileged and protected, unless the privilege was abused. The trial court further had instructed the jury that the qualified privilege was abused if Williams "knew the statement was false or made it with reckless disregard of whether it was false or not." Therefore, even before it awarded punitive damages, the jury found by clear and convincing evidence that Williams had made the statements with actual malice.

Notwithstanding the jury's finding, however, we must make an independent review of the record. *The Gazette*, 229 Va. at 19, 325 S.E.2d at 727. We must decide

> whether the evidence in the record on appeal is sufficient to support a finding of *New York Times* "actual malice" by clear and convincing proof. . . . This does not mean that the reviewing court may disregard the determinations made on credibility of witnesses by the trier of fact or that the presumption of correctness that attaches to factual findings is to be discounted. . . . The rule simply means that appellate judges in such a case must examine the facts pertinent to the punitive-damage award and exercise independent judgment to "determine whether the record establishes actual malice with convincing clarity."

Id. at 19, 325 S.E.2d at 727-28 (citations omitted).

Having made the independent review required by *The Gazette* and given due deference to the trial court's judgment, we conclude that the record supports the finding of actual malice with convincing clarity. Thus, we hold that the trial court did not err in refusing to set aside the punitive damages award.

2

The trial court, however, ordered Garraghty to remit $100,000 of the punitive damages award, thereby reducing it to $25,000. Garraghty has assigned error to that ruling (Record No. 940729).

We have not previously stated what standard we should apply in reviewing such a ruling by a trial court. Williams contends that the standard of review should be merely whether the trial court abused its discretion.

We decline to adopt this standard of review in such cases. Instead, we hold that, when a trial court orders or refuses to order a remittitur of punitive damages in a defamation action, we shall make an independent examination of the entire record to determine whether the trial court acted properly. In doing so, we will give substantial weight to the trial court's action and affirm it, unless, from our view of the record, the trial court acted improperly.

The record discloses that Williams' annual salary is $32,000 and that her only substantial asset is her one-half interest in her dwelling, purchased for $29,500 approximately 18 years prior to the trial. The trial court concluded that the jury's award of punitive damages was

excessive and could "result in financial ruin to [Williams]." From our independent review of the entire record, we conclude that the trial court acted properly in ordering the remittitur.

IV

A

The final two issues raised are interrelated and arise out of Garraghty's appeal (Record No. 940729). Garraghty contends that the trial court erred in (1) denying his claim for "personal damages"[3] and (2) ruling that his claims of intentional and negligent infliction of emotional distress were within the exclusive jurisdiction of the Workers' Compensation Act (the Act). These rulings by the trial court present a single question, *i.e.*, whether Garraghty's claims of "personal damages" for defamation as well as his emotional distress actions are barred by the exclusive jurisdiction of the Act. The answer to the question turns on whether Garraghty sustained an "injury by accident."

We have defined "injury by accident" within the context of the Act as "an *identifiable incident or sudden precipitating event* [that results] in an *obvious sudden mechanical or structural change in the body.*" *Morris v. Morris*, 238 Va. 578, 589, 385 S.E.2d 858, 865 (1989); *accord Middlekauff v. Allstate Insurance Co.*, 247 Va. 150, 153, 439 S.E.2d 394, 396 (1994). Also, we recently affirmed the long-standing rule that a gradually incurred injury is not

---

[3] By "personal damages," the trial court was referring to damages for pain and suffering, humiliation, embarrassment, and mental distress.

an injury by accident within the meaning of the Act. *Middlekauff*, 247 Va. at 154, 439 S.E.2d at 397 (compiling cases).

Generally, the damages that flow from an action for intentional or negligent infliction of emotional distress are not the result of an injury by accident within the meaning of the Act, but result from a gradually incurred injury. Likewise, the "personal damages" that Garraghty sought to prove as a result of the defamation do not constitute such an injury by accident. We hold, therefore, that the trial court erred in ruling that these claims were within the exclusive jurisdiction of the Act.

B

Finally, on brief, Garraghty "moves this Court to order a new trial on the issue of personal damages only, and a new trial on the issue of intentional infliction of emotional distress and negligent infliction of emotional distress." We cannot order such piecemeal relief. If a new trial were ordered, it would have to be on all issues, and Garraghty does not request such relief.

V

Accordingly, notwithstanding the error committed by the trial court regarding Garraghty's claims for "personal damages" and for emotional distress, we will affirm the trial court's judgment.

Affirmed.

JUSTICE WHITING, concurring in part and dissenting in part.

JUSTICE KEENAN, with whom JUSTICE LACY joins, concurring in part and dissenting in part.

GLORIA B. WILLIAMS

v. Record No. 940727

DAVID A. GARRAGHTY

DAVID A. GARRAGHTY

v. Record No. 940729

GLORIA B. WILLIAMS

JUSTICE KEENAN, with whom JUSTICE LACY joins, concurring in part and dissenting in part.

I disagree only with the remedy devised by the majority. Paradoxically, the majority finds reversible error in the trial court's ruling that the Workers' Compensation Act bars some of Garraghty's tort claims, and yet affirms the trial court's judgment.

I agree with the majority that this Court is unable to award Garraghty piecemeal relief. However, the relief required under these circumstances is a new trial on all issues. In fact, Garraghty conceded at oral argument that the claims he seeks to present on remand would "overlap" with the claims for which the jury has already awarded damages, and could gain him a double recovery.

Moreover, Garraghty has not asked to withdraw his request for a new trial on the overlapping claims if this Court should affirm the jury's verdict. Therefore, I would reverse the trial court's judgment and remand these cases for a new trial on the claims raised in both motions for judgment.

GLORIA B. WILLIAMS

v. Record No. 940727

DAVID A. GARRAGHTY

DAVID A. GARRAGHTY

v. Record No. 940729

GLORIA B. WILLIAMS

JUSTICE WHITING, concurring in part and dissenting in part.

I agree with the other dissenters that the majority's result is paradoxical; the majority opinion holds that Garraghty was entitled to claim the additional damages denied by the trial court, yet denies him the right to recover those damages on the ground that he cannot have the piecemeal relief he requests in his brief. But I think that the other dissenters' approach is equally paradoxical; although Garraghty has essentially prevailed in these appeals, the other dissenters would take from Garraghty the $177,597 judgment to which all justices agree he would be entitled to, had he not insisted on a new trial.

The majority's solution is to conclude that Garraghty would rather keep his judgment than risk its loss in a new trial, although the majority notes that no such claim was made on brief. However, during oral argument, when presented with the possibility that Garraghty might have to elect whether to take his judgment now or risk the loss of his entire claim in a new trial, Garraghty's counsel responded in pertinent part to the Court's several inquiries:

> Justice, I would say if we had the opportunity, plaintiff, [if] he had his otherwise [valid] award sustained, would probably look very seriously at whether or not he would want to go through another trial.
>
> . . . .
>
> It may be a double recovery. We may be looking at, say, well, we've got one and the Court may put us to terms, quite frankly.
>
> . . . .
>
> I think again, the Court could remand it giving the prevailing party the choice whether proceeding it [sic] or stop it at that point, not go forward any further.

I do not think that we have the right to make this election for Garraghty, especially since his counsel asked for that right in oral argument. Accordingly, I would require the exercise of that right before entry of our order. And I would not "throw out the baby with the bathwater," as the other dissenters propose.

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF NOTTOWAY COUNTY

DAVID A. GARRAGHTY,

Plaintiff,

v. CASE NO. 92-79

GLORIA B. WILLIAMS,

Defendant.

JUDGMENT ORDER

This matter came to be heard upon the filing of the Plaintiff's Motion for Judgment alleging among other causes, defamation against the Defendant arising out of and in the course of their relationship as employees of the Department of Corrections at the Nottoway Correctional Center in Nottoway County, Virginia. The Court's ruling on the demurrer, and the parties' respective exceptions to those parts of the ruling adverse to them, are set forth more fully in this Court's Order of March 14, 1993, which is incorporated herein as if fully set forth.

Thereafter, the Defendant filed her Answer and the issues were joined. On August 17, 1993, the parties came before this Court on the defendant's Motion for Summary Judgment and the plaintiff's response thereto. The Court overruled the Motion, to which ruling the defendant noted her exception for the reasons stated in her memorandum, which is hereby incorporated in the record of these proceedings. The matters proceeded to trial on

August 24, 25 and 26, 1993 in the Circuit Court of Nottoway County, Virginia, at which time a jury was selected and sworn in.

During the presentation of the evidence at trial various motions and objections were made and the rulings thereto were issued and exceptions taken therein by their respective parties. The aforementioned motions, objections, rulings and exceptions are set forth in the trial record and are hereby incorporated by reference as if fully set forth herein.

After the conclusion of the evidence, Jury Instructions were submitted to the Court, and again exceptions were taken to the given and rejected Instructions by the respective parties. Those Instructions, objections, rulings and exceptions which are set forth in the record are hereby incorporated by reference as if fully set forth herein. Thereafter the Court proceeded to read its instructions to the Jury, who, after argument of counsel, retired to its chambers to consider its charge, and after due deliberation returned and awarded its verdict to the Plaintiff awarding the Plaintiff compensatory damages in the sum of $152,597.00 and punitive damages in the amount of $125,000.00.

The Defendant moved this Court to set aside the jury's verdict, at which time the Court took said motion under advisement and ordered briefs thereon.

By opinion letter of October 5, 1993 this Court ordered that the Defendant's motion to set aside the jury's verdict as to the issue of compensatory damages be denied in that the Court was of the opinion that the

compensatory award was supported by the law and the evidence.

The Court thereafter Ordered briefing on the issue of punitive damages. Briefs were thereafter filed and on January 7, 1994, the parties appeared by counsel and argued the same. Upon consideration of the requirement of this Court to make an independent examination of the record in terms of punitive damages, and considering the case of *Johnson v. Hugo's Skateway,* 949 F.2d, 1338 (4th Cir. 1991), being mindful that any award of punitive damages should not be excessive and otherwise result in financial ruin to the Defendant, this Court ordered remittitur of the punitive damage award to the Plaintiff from $125,000.00 to $25,000.00. The Defendant hereby notes her exception to the ruling of the Court denying her Motion to set aside the jury verdict in its entirety and specifically with respect to both the compensatory and punitive damage awards, for the reasons stated in her briefs, and the Plaintiff hereby notes his exception to the remittitur of the punitive damage award.

WHEREFORE the Court being of the opinion that said verdict is for an excessive amount of punitive damages, put the Plaintiff upon his election to have said verdict set aside and a new trial awarded, or to abate the amount thereof to $25,000.00; and the Plaintiff having elected, under protest, to have judgment for said amount of $25,000.00 in lieu of the amount of verdict, it is therefore,

ADJUDGED, ORDERED and DECREED that the Plaintiff, David A. Garraghty, receive of the Defendant, Gloria A. Williams, the sum of $177,597.00 with interest

therefrom at the rate provided by law from the date of August 26, 1993, until paid, and that it recover from the Defendant his cost in this behalf expended.

And the Defendant, by counsel, having indicated her intention to take an appeal from this judgment, and having moved for a suspension of execution of this judgment pending action thereon by the Supreme Court of Virginia, it is further ORDERED that execution of this judgment be and is hereby suspended for a period of ten (10) days and thereafter until the Supreme Court takes dispositive action on Plaintiff's petition for appeal and any appeal granted thereon, provided that within said period of ten (10) days, Defendant files with the Clerk of this Court, an appeal bond or irrevocable letter of credit in the penalty of $210,000.00, with surety to be approved by this Court, conditioned according to law; and it is further ORDERED that the transcript of testimony taken at the hearing before this Court in this matter on the dates of August 24, 25, 26, 1993, be made part of the record in this case provided that said transcript be filed in the office of the Clerk of this Court within sixty (60) days from the date of this Order.

ENTER: 2/10/1994

/s/ James F. D'Alton, Jr.
Circuit Court Judge

Seen and Objected to
(to the extent reflected in the Order):
and it's incorporated references

/s/ James B. Thorsen
James B. Thorsen, P.C., Esquire
THORSEN PAGE & MARCHANT
316 West Broad Street
Richmond, Virginia 23220-4257
(804) 644-0711
Counsel for Plaintiff

Seen and Objected to for the reasons stated:

/s/ Barbara J. Gaden
Barbara J. Gaden, Esquire
Guy W. Horsley, Esquire
Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624
Counsel for Defendant

APPENDIX C

INSTRUCTION NO. 12

Under certain circumstances, a person has a limited privilege to make a defamatory statement about another without being liable for damages.

Under the circumstances of this case, the defendant's statement was privileged because she has an interest or duty in the subject, and she made the statement to another person with a similar interest or duty. The defendant's statement is not protected, however, if she abused the privilege.

A privilege is abused when the plaintiff proves by clear and convincing evidence that:

(1) the defendant knew the statement was false or made it with reckless disregard of whether it was false or not; or

(2) the statement was deliberately made in such a way that it was heard by persons having no interest or duty in the subject of the statement; or

(3) the statement was unnecessarily insulting; or

(4) the language used was stronger or more violent than was necessary under the circumstances; or

(5) the statement was made because of hatred, ill will or a desire to hurt the plaintiff rather than as a fair comment on the subject.

D objects to ¶'s 2, 3, 4.
VMJI Defamation – No. 37-050
Given JFD

APPENDIX D

DEFENDANT'S INSTRUCTION NO. 2

If you find that defendant's statement concerning plaintiff was false and defamatory, you may still find for defendant because under certain circumstances, a person has a limited or qualified privilege to make a defamatory statement against another without being liable for damages.

Under the circumstances of this case, the defendant's statement was privileged because she has a right under federal law to be free from sexual harassment and from acts of retaliation for asserting a claim of sexual harassment, and to protect this right by seeking redress from any violation of it.

Defendant's statement is not protected, however, if she abused her privilege to assert her claim of sexual harassment. Her privilege is abused when plaintiff proves by clear and convincing evidence that:

(1) defendant knew the statement was false or made it with reckless disregard of whether it was false or not; or

(2) defendant made the statement because of hatred, ill will or a desire to hurt the plaintiff, rather than to seek redress for what plaintiff perceived, in good faith, to be a violation of her rights.

DENIED
JFD

#37.050 VMJI; *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980); *Coleman v. Wayne State University*, 664 F. Supp. 1082 (E.D. Mich 1987); 42 U.S.C. ¶2000e(3)

APPENDIX E

[seal]

COMMONWEALTH of VIRGINIA

Department of Corrections
Division of Adult Institutional Services
Nottoway Correctional Center
Post Office Box 488

DAVID A GARRAGHTY
WARDEN

(804) 767-5543
BURKEVILLE VA 23922

MEMORANDUM

TO: DAVID A GARRAGHTY, WARDEN

FROM: GLORIA B. WILLIAMS, GBW
HUMAN RESOURCE OFFICER

SUBJECT: HARASSMENT

I am requesting a meeting with you to discuss what I perceive to be Sexual Harassment once again. Since 3/17/92, when I brought your paycheck to your house and you made the following remarks:

1. You – "Do you want to mess around?"
   Me – No

2. You – "I guess your husband would kill you if you did."
   Me – Yes

You did discontinue that line of conversation at that point and we finished discussing work and I left your house.

Since that time, once again, I have started getting derogatory notes reference my work and performance from you. You have as yet to speak to me personally reference any problems (just notes).

David, from 1986-1988 you and I had a similar problem after I advised you that I was pregnant and getting married. You and I had been seeing each other from 1982 to April 1986. You asked me at that time, why I had not told you about Chuck. Since we had not been seeing each other outside work since April of 86, I did not understand why you felt I needed to discuss Chuck with you. Soon after that, I started getting derogatory notes, and you took my performance from 50 to 28 over the two year period. You had me so stressed out because of your attitude toward me that you caused me to have an angina attack and spend 5 days in the hospital (3 days of this in ICU) and eventually to resign in July of 1989.

It took my going to the hospital for you to stop attacking my work performance and stop sending me derogatory notes, and evaluate me fairly on my performance.

Previously when this all happened, I felt threatened and knew if I made a formal complaint, that I would have to resign. I was not in a position at that point in time financially to do this. However, after the trip to the hospital and near heart attack, at the recommendation of my doctor, I started making plans to resign and relocate.

David, I don't want to have to make a formal complaint now. I'd like to think we can work this out, but I can't deal emotionally with another sparring match with you.

Please advise me of a time that will be convenient to meet discuss this situation.

APPENDIX F

CONSTITUTION OF THE UNITED STATES

ARTICLE VI

Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX G

Excerpts from 42 U.S.C. § 2000e-3(a)

("the opposition clause")

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter.

(2)

Supreme Court, U.S.
FILED
JUN 30 1995
OFFICE OF THE CLERK

No. 94-1959

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

GLORIA B. WILLIAMS,

Petitioner,

V.

DAVID A. GARRAGHTY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James B. Thorsen
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BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Supreme Court of Virginia err in finding that Title VII of the Civil Rights Act of 1964 was not implicated in Williams' rejected jury instruction in Respondent's state defamation suit?

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NO. 94-1959

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

GLORIA B. WILLIAMS,

Petitioners,

v.

DAVID A. GARRAGHTY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Your Respondent, David A. Garraghty, respectfully requests this Court to deny the Petition for Writ of Certiorari submitted by Petitioner, Gloria B. Williams, who seeks review of the Supreme Court of Virginia opinion of March 3, 1995, Williams v. Garraghty, ___Va. _____, 455 S.E.2d 209 (1995), and which is reprinted in the Petition for Writ of Certiorari at Appendix A.

STATEMENT OF THE CASE

I. Background

David A. Garraghty began his employment with the Department of Corrections in 1972. (J.A. 318)[1]. Williams had known Garraghty for most of the time he had been with the Department of Corrections (J.A. 26). Garraghty had been a Warden with the Department of Corrections, first starting at Deep Meadow Correctional Center in 1980 until 1982. In 1982 he opened the Brunswick Correctional Center where he was Warden and where Williams was his personnel officer. They worked together at Brunswick Correctional Center from 1982 until 1984. In 1984 Garraghty was assigned by the Department of Corrections to open the new Nottoway Correctional Center as Warden. With this new move he brought along Williams as his personal director to Nottoway. (J.A. 27, 30, 317). According to Garraghty, he and Williams dated for approximately six months in 1984. (J.A. 322-323).

While at Nottoway Correctional Center, Garraghty experienced a number of conflicts with then Governor Robb and his administration which resulted in a confidential memo of September 3, 1985 from then Secretary of Public Safety,

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[1]J.A. reference herein is to the Joint Appendix filed in the Supreme Court of Virginia.

Andrew Fogerty, to Governor Robb. (J.A. 631-634).

The aforementioned memo outlined how the Department of Corrections' Director, Allen Sieloff, had been actively seeking to document a case of insubordination and inappropriate behavior against Mr. Garraghty for the purposes of terminating him. Much to Sieloff's frustration, however, recent advice from the Attorney General's office indicated that absent overtly, insubordinate, inappropriate behavior by Garraghty, the Director may be enjoined from termination upon a suit alleging that Garraghty's First Amendment rights had been abridged. (J.A. 633-644).

The plan at the time was to move Garraghty from the Nottoway Correctional Center to the Central Office in Richmond. At that time Mr. Ed Murray was Mr. Sieloff's Deputy Director. (J.A. 631).

As of 1992, Williams knew the attitude of the administration of the Department of Corrections towards Garraghty. Williams stated: "I don't know that there were many people that didn't". Williams testified regarding the attitude that the hierarchy had at the Department of Corrections and stated: "He wasn't one of their favorite people I'm sure". (J.A. 120)

Williams remained the personnel officer at Nottoway Correctional Center from 1984 until approximately July of 1989 when she left the Department of

Corrections after marrying and moving with her husband to the West Coast. (J.A. 338). Williams returned to the Department of Corrections' Central Office in March of 1990. She then returned to Nottoway Correctional Center in November of 1990, again as Garraghty's personnel officer, after having applied for that position in September of 1990. (J.A. 711).

Upon Williams' return in November of 1990 as personnel officer for Nottoway Correctional Center, she began her employment off on a good foot. However, over the next year employment deficiencies were noted in regards to her performance. Part of Williams' performance problems involved her failure to develop Internal Operation Procedures (IOPs) for the correctional unit, as well as her attendance problems at the Correctional facility. Garraghty wrote to Williams a formal counseling memo on December 6, 1991 about the aforementioned specific problems.

During this time period, the Nottoway Correctional Center was conducting quarterly performance evaluations of its employees. Garraghty was responsible for reviewing Williams' performance evaluation annually and on a quarterly basis. Williams' last annual performance evaluation was October of 1991, and her most recently quarterly evaluation was February 2, 1992. Williams was next scheduled for her quarterly performance evaluation on or about the first week of May 1993, and it appeared that she had

concerns that this evaluation was going to reflect a continuation of the on-going problems previously documented in her quarterly and annual reviews.

II. The Defamatory Letter of May 1, 1992

On March 17, 1992 Garraghty was sick and did not come into work that day, remaining in his Warden's home just off the Correctional facility's main compound. At that time he called in to the personnel office to ask to have his assistant, David Robinson, deliver to his home his paycheck. Williams took Garraghty's call and told Garraghty that she would be happy to bring it to his home. Garraghty said that would be fine, and she could drop it off in his mailbox. Instead, Williams insisted to come to Garraghty's home to discuss with him some institutional matters.

It was at this meeting at Garraghty's home that Williams alleged that Garraghty asked her if she wanted to "mess around". (Pet.A-30). Garraghty throughout this matter has denied any such conversation took place. Thereafter, Garraghty and Williams continued their talk at Garraghty's home, and Williams left a short time later.

On the morning of May 1, 1992, Garraghty came into his office and found a white envelope on his desk addressed to

Dave. Garraghty opened the envelope and read Williams' undated letter to Garraghty which was addressed to him on the Department of Corrections letterhead (See Pet. A-30). Garraghty had never heard of any of the claims in the letter before May 1, 1992, such as Williams being hospitalized for an angina attack due to the stress while working for Garraghty at the Department of Corrections prior to 1989 or because of his prior sexual harassment as being the reason why she left in 1989.

After reading the letter Garraghty called into his office one of his employees, a woman named Kern Gillian, to read the letter. Gillian read the letter and was present at the time Williams was called into Garraghty's office to discuss the letter. At that time Garraghty also discussed with Williams his concern about her on going work performance deficiencies. During this meeting, Williams was asked by Garraghty what did she want to do with the letter and Williams replied she did not know what she wanted to do. Immediately after the meeting was concluded, Garraghty self reported himself to his immediate supervisor, Richard Young, by telephone and by letter.

After the meeting Williams called Paul Broughton, the manager of the Employee Relations Department of the Department of Corrections and told him the meeting with Garraghty did not go well.

Williams took no further action in regards to her issues raised in her letter to Garraghty. Though she had years of training as a personnel officer with the Department of Corrections, she filed no grievance against Garraghty with the Department of Corrections, nor did she file any complaint with the State office of Equal Opportunity Employment Service (EOES), nor did she file with the Equal Opportunity Employment Commission. (J.A. 698).

As a result of Garraghty's self reporting of the incident to the Department of Corrections, the Director, Ed Murray, ordered an internal investigation. As a result of the internal investigation, Garraghty was terminated by Ed Morris, the Deputy Director of the Department of Corrections, on August 25, 1992, effective September 25, 1992, without any meaningful pre or post termination hearing where he confront and examine his accusers.[2]

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[2]In 1985, in part as a result of Garraghty's criticism of the Robb administration, the General Assembly of Virginia amended the Virginia Personnel Act and excluded Wardens and superintendents of the Department of Corrections from participating in the State's Grievance Procedure. This became effective July 1, 1985. This particular provision of the amendment to the Virginia Personnel Act was known as the "Garraghty Bill".

At the time of his termination in August of 1992, Garraghty consistently asked the Department of Corrections for a grievance panel hearing to challenge his termination. The Department of Corrections denied his request stating that he was an exempt employee.

Thereafter, in December of 1993 Garraghty brought an action in the United States District Court for the Eastern District of Virginia, Richmond Division, pursuant to 42 U.S.C. §1983 against the Department of Corrections, Director Murray, Deputy Director Morris, Paul Broughton, Richard Young, and two internal affairs investigators, Zimmerman and Moore, alleging deprivation of due process rights (property and liberty interests), First Amendment rights, and breach a State breach of contract claim.

Thereafter, the Defendants filed a Motion for Summary Judgment alleging qualified immunity. The United States District Court in June of 1994 denied the Defendants' claim of qualified immunity, to which the Defendants took an interlocutory appeal by right to the Fourth Circuit Court of Appeals on the issue of qualified immunity.

The Fourth Court of Appeals in its decision of May 9, 1995, Garraghty v. Commonwealth of Virginia, 1995 U.S. App. LEXIS 10478, (4th Cir. Ct. 1995), sustained the District Court's ruling of denial of qualified immunity and remanded

Garraghty was allowed to have a review of the termination by Director Murray, who undertook the review and upheld the termination in October of 1992. Garraghty was afforded the opportunity to have his termination reviewed by then Secretary of Public Safety, O. Randolph Rollins.

During the time period that Rollins was reviewing Garraghty's termination, Garraghty initiated his State cause of action against Williams by filing a claim of defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress against Williams in the Circuit Court of Nottoway County in November of 1992.

During the pendency of Garraghty's State claim, Rollins, by letter of April 4, 1993, modified Garraghty's termination and ordered his reinstatement as a Department of Corrections employee, ordered his demotion from Grade 17 to Grade 16, ordered a thirty day suspension, ordered his removal as Warden of Nottoway Correctional Center, and placed him in a make-work position in the Central Office of the Department of Corrections.

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the case back to the District Court where the matter has now been set for trial for September 7 and 8, 1995.

III. State Court Action

The State Court action by Garraghty against Williams went to trial on August 23-25, 1993, on Garraghty's claim of common law defamation and a claim of insulting words pursuant to §8.01-45 of the Code of Virginia (1950), as amended, for Garraghty's "non-personal" damages, the Trial Court having ruled that Garraghty's claim for personal damages for defamation and insulting words, as well as intentional and negligent infliction of emotional distress were all barred by the exclusive jurisdiction of the Virginia Workers' Compensation Act.[3]

At the trial there was no evidence that Williams was asserting a claim of sexual harassment with anyone. Williams' own testimony states that she never made any kind of formal complaint to the Department of Corrections, that she never intended to make a claim, and has never filed any kind of complaint or suit or anything of any nature with any authority as a result of the events alleged in her letter of May 1, 1992. (See J.A. 511-512).

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[3]This ruling was found to be in err and was reversed by the Supreme Court of Virginia, but was not remanded. (Pet. A-17-18).

Further during the trial, Williams presented little, if any, evidence in support of the facts alleged in her memo of May 1, 1992. Likewise, Williams was unable to rebut any of the evidence brought by Garraghty showing that her allegations were false and malicious.

Thereafter, in preparation of the Jury Instructions, Williams attempted to introduce her Instruction No. 2. In Instruction No. 2 Williams states that her May 1, 1992 letter was privileged because she has a right under federal law to be free from sexual harassment and acts of retaliation for asserting a claim of sexual harassment and to protect this right by seeking redress from any violation of it. (See Pet. A. A-28).

Further, Williams sought to state that the law of qualified privilege is abused when the Plaintiff proves by clear and convincing evidence that (2) "Defendant made the statement because of hatred, ill-will, or desire to hurt the Plaintiff, rather than to seek redress for what the Plaintiff (sic), perceived in good faith, to be a violation of her rights".

The Trial Court rejected the argument of Williams that there was a federal issue involved, or that it was a correct statement of the law as it related to the issues and facts at trial. Instead, the Trial Court granted Garraghty's Instruction No. 12. (See Pet. A 27).

Upon submission of the Instructions to the Jury, it returned a verdict against Williams for compensatory damages in the amount of $152,597.00 and punitive damages in the amount of $125,000.00.

Thereafter, the Trial Court confirmed the Jury's verdict, but reduced the punitive damages from $125,000.00 to $25,000.00. Both Williams and Garraghty appealed the Trial Court's rulings contrary to their interest to the Supreme Court of Virginia. (Pet. A-22-26).

The Supreme Court of Virginia affirmed the Trial Court's ruling as to the instructions at issue, and rejected Williams' claim of err. The Virginia Supreme Court stated that even if the present case were a Title VII proceeding, Williams would not have been immunized from a State defamation action. (See Pet. A-11-12).

SUMMARY OF THE ARGUMENT

Where Williams writes Garraghty a defamatory letter, and where Garraghty has shown such by clear and convincing evidence that the same is false and malicious, and when Williams never intended to make either a formal or informal complaint of sexual harassment with anyone, she has not asserted any right under federal law which would permit the giving of her qualified privilege Jury Instruction (No. 2).

Even if she should have been allowed to have her instruction given, it would have made no difference in the outcome of the case.

REASONS FOR DENYING THE WRIT

Argument

I. Virginia Supreme Court Ruling Is The Correct Statement of the Law.

The Virginia Supreme Court considered Williams' contention the Trial Court erred in granting Garraghty's instruction on qualified privilege and rejected Williams' proffered instruction thereby denying her the qualified privilege to assert her right recognized by federal law to be free from sexual harassment.

The Virginia Supreme Court rejected Williams' contention based on the facts of the case. Further, the Court stated that even if the case were a Title VII proceeding, Williams would not have been immunized from Garraghty's State defamation action, citing Barticula v. Paculdo, 411 F. Supp. 392, 397 (W.D. MO 1976).

Williams goes on to argue that the Virginia Supreme Court's decision is in conflict with cases that have addressed this issue in the Federal Circuit Court, as well as the conflict within the Federal Courts. (See Williams' footnote 3 Pet. A-8).

Rule 10 of the Rules of the Supreme Court of the United States states in relevant part that:

> "(a) Petition for Writ of Certiorari will be granted only when there are special or important reasons therefor. The following, while neither controlling or fully measuring the Court's discretion, indicate the character of reasons that will be considered; ...
>
> (b) when a State Court of last resort has decided a federal question in a way that conflicts with the decisions of another State Court of last resort or of a United States Court of Appeals.
>
> (c) states: When a State Court ... has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court".

As to the two foregoing criteria, while neither controlling nor fully measuring this Court's discretion, Williams has utterly failed to point out exactly what conflicts arise between the Virginia Supreme Court's decision in the instant case, and that of any United States Court of Appeals. Further,

Williams has failed to point out where the instant Virginia Supreme Court decision represents an important question of federal law which has not been but should be settled by this Court, or has decided a federal question in a way which conflicts with applicable decisions of this Court.

II. A Virginia Supreme Court Opinion Is Not In Conflict with Interpretation of the Opposition Clause by the Federal Judiciary.

Williams argues that her proffered Instruction No. 2 is supported by Federal District Court decisions of Coleman v. Wayne State University, and EEOC v. Virginia Carolina Veneer Corporation.

Williams is mistaken. There is a clear distinction between the instant case and the cases cited by Williams.

In Coleman v. Wayne State University, 664 F. Supp. 1082 (E.D. MI 1987), the Trial Court found that it was the Defendant's intent to retaliate against Coleman for "making a commotion about racism and lack of compliance with affirmative action at the University". Coleman, supra. at p. 1093. A review of Coleman's case shows that he was involved in affirmative action groups, testified before legislative committees, and he protested that he was constantly harassed at his job over a long period of time. Coleman's commotion about racism and lack of compliance about affirmative action

resulted in his filing a complaint with the EEOC and a subsequent lawsuit.

Williams' reliance upon EEOC v Crown Zellerbach Corporation, 720 F.2d 1008 (9th Cir. 1983), is misplaced. In Crown Zellerbach black employees filed complaints with the EEOC and engaged in several other protest measures. They formed an organization entitled "the concerned black Zellerbach employees" and wrote letters to elected officials at the federal, state and local levels.

Clearly, the Coleman and Crown Zellerbach cases are distinguished from the instant case on their facts as well as the law involved, especially here where Williams never intended to make any complaint and where it was shown her allegations in her May 1, 1992 letter were false and malicious.

Williams also claims that the Virginia Supreme Court decision stands in irreconcilable conflict with precedents of the Federal Circuit Courts. For this proposition, Williams would rely on Garziano v. E. I. DuPont De Nemours and Co., 818 F. 2d. 380 (5th Cir. 1987). (Pet. p. 11). Interestingly, a review of Garziano finds Williams is mistaken as there was no discussion of the "opposition clause". Further, the case was not only reversed, as pointed out by Williams, but was remanded for determination of whether qualified privilege was abused by excessive publication, under Mississippi law.

III. Jury Instruction Was Proper.

No where does Williams argue that having her jury instruction granted would have resulted in a different verdict in this case.

There was overwhelming evidence for the Jury to find that Williams knew the statements she made were false or that she made it with reckless disregard of whether it was false or not. (compare Instruction No. 12 (1) with Instruction No. 2 (1) A. A-27, A-28).

The punitive damage Jury Instruction No. 15 given in this case and cited at App. A-1 herein, follows the above quoted language and required the Jury to find (again) by clear and convincing evidence that the Defendant made the statements with actual malice; that is, she knew they were false or she made them so recklessly as to amount to a willful disregard for the truth, ...".

When comparing the punitive damage instruction with paragraphs 1 and Garraghty's Instruction No. 12, and Williams' Instruction No. 2, respectively, it appears clear that even if Williams' Instruction No. 2 would have been given, that Garraghty would have been able to overcome any qualified privilege Williams' asserted. Further, the punitive damage instruction addresses the issue of good

faith which is raised in Williams' Instruction No. 2 (paragraph 2). Thus, even if this Court finds there was err by the Trial Court in not giving Williams' instruction, the err appears totally harmless. Further, Williams has not argued that Garraghty could not bring his defamation action, only that the Jury should have been told that Garraghty had to show an abuse of Williams' privilege to assert her right under federal law to be free from sexual harassment and form acts of retaliation for asserting a claim of sexual harassment.

Garraghty overcame that privilege by showing Williams' assertion of that privilege was false or made with reckless disregard of whether or not it was false.[4] This confirms the Virginia Supreme Court's reliance on Barticulia v. Paculdo, 411 F. Supp. 392 (W.D. Mo., 1976) where the United States District Court stated at 379: "it would required a torture construction of Title VII, in 2000e-3(a) to say that it permitted defamatory and liableous statements in guise of protecting employees rights to oppose unlawful employment practices".

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[4]The Jury also heard from Williams' employer who investigated her allegations against Garraghty. Obviously, the Jury found no "merit" to Williams' complaint. (Compare Petition Argument p. 14).

IV. No Violation of Supremacy Clause.

Williams would have this Court believe that under the facts of this case, there is a clear conflict between the federal protection afforded employees to oppose prohibitive discrimination in the work place under Title VII and the limitation of Virginia law of qualified privilege for employees who complain of their supervisor's conduct. Williams goes on to state that because the narrow privilege provided by State law has the affect of defeating the broad protection afforded by the opposition clause, and that the former must yield to the latter.

Interestingly enough, Williams cites no law to support such proposition. There is no indication in the legislative history of the opposition clause that this is the design of the clause, nor is there any indication that the opposition clause should eliminate a citizen's at least equal, if not greater, and fundamental right to protect his good name and reputation by bringing a defamation action, even in the presence of a Title VII claim.

In the instant case Williams made an allegation against Garraghty that resulted in a devastating affect of Garraghty being terminated from a twenty-year career without any hearing to protect his property or liberty interests (good name and reputation). Williams took no risk of going to the EEOC and filing under oath the defamatory statements she had in her

letter of May 1, 1992, which would have subjected her to perjury. Further, Williams knew that Garraghty was exempt from the State's Grievance Procedure and therefore could not engage her claims in the form of a grievance panel hearing.

The only forum left to Garraghty was to seek redress for such scurrilous language by filing his defamation action in the appropriate State Court. Garraghty did so well after the 180 day period in which Williams could have filed her claim with the EEOC. Further, once Williams was sued in State Court, she never claimed that Title VII was an absolute bar to Garraghty's defamation claim. She only claimed a qualified privilege. The Trial Court heard her federal law arguments and based on the facts of the case, rejected the same when giving the jury instructions which are at issue.

Like the Trial Court, the Virginia Supreme Court also rejected Williams' argument, as should this Court by denying Williams' Petition for Writ of Certiorari.

CONCLUSION

As Justice Powell said in Rankin v. McPherson, 483 U.S. 378 (1987), at 392: "It is not easy to understand how this case has assumed constitutional dimensions and reached the Supreme Court of the United States".

Contrary to Williams' assertion, this case raises no important issues, the resolution of which would be necessary to preserve the protection of Title VII to employees asserting their rights to a work environment free of sexual harassment.

Title VII affords plenty of protection for Williams and others similarly situated. However, Williams never chose to seek Title VII protection, especially here where she had superior knowledge of Title VII arising from her position as personnel officer of Nottoway Correctional Center.

Williams' testimony that she never intended to make a claim or never filed any kind of claim with anyone is exactly why this Court should not do what Williams herself refused to do, and that is to raise her utterly false and malicious concern of sexual harassment to the level of a federal question.

Accordingly, this Court is respectfully asked to deny Williams' Petition for Writ of Certiorari.

Respectfully submitted,

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Plaintiff's Instruction No. 15

If you find that the plaintiff is entitled to be compensated for his damages, and if you further believe by clear and convincing evidence that the defendant made the statements with actual malice; that is, she knew they were false or she made them so recklessly as to amount to a willful disregard for the truth, then you may also award punitive damages to punish a defendant for her actions and to serve as an example to prevent others from making such statements in the future.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.

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